84-223

No.



# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1984

TRIPLE "A" MACHINE SHOP, INC.,
*Petitioner,*

vs.

SOUTHWEST MARINE, INC.,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MICHAEL N. KHOURIE
COUNSEL OF RECORD
DANIEL J. FURNISS
MARK J. LEHOCKY
KHOURIE & CREW
101 California Street
Suite 1550
San Francisco, CA 94111
(415) 982-1550
*Counsel for Petitioner*

August 6, 1984

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

## QUESTION PRESENTED

Whether truly complete involvement and participation in a monopolistic scheme can be a basis, wholly apart from the idea of in pari delicto, for barring respondent's cause of action under the federal antitrust laws. Perma Life Mufflers Inc. v. International Parts Corp. 392 U.S. 139, 140 (1968)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No.

_____

IN THE SUPREME COURT
OF THE
UNITED STATES
---
OCTOBER TERM, 1984

---

TRIPLE "A" MACHINE SHOP, INC.,
Petitioner,
vs.
SOUTHWEST MARINE, INC.,
Respondent

---

PETITION FOR WRIT OF CERTIORARI

The opinion of the United States Court of Appeals for the Ninth Circuit, reported at 732 F.2d 744, appears as Appendix A hereto.

## JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 7, 1984. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

## STATEMENT OF THE CASE

A drydrock facility ("the Graving Dock") was leased by the United States Navy to the San Diego Unified Port District ("the Port") which permitted its use by defendants herein under an operating agreement.

Petitioner Triple "A" Machine Shop, Inc. ("Triple A"), and other ship repair companies were sued by respondent Southwest Marine, Inc., ("Southwest Marine") a competing ship repair company, for injunctive relief and damages under Sections 1 and 16 of the Sherman Act (15 U.S.C. §§1, 26). Respondent's president and chairman of the board of directors, and dominant shareholder Arthur Engel, is the former general manager of petitioner's San Diego-based division ("Triple A South") and a nephew of petitioner's president and chairman of the board, Albert Engel. Arthur Engel was a shareholder of petitioner and participated in its profit sharing fund. (Tr. Vol. IX 1332)

As petitioner's general manager, Arthur Engel drafted, negotiated and executed an agreement on petitioner's behalf with other ship repair companies (all defendants in this action), referred to as the "User's Agreement", which governed the use by petitioner and others of the Graving Dock. (Tr. Vol. X 1422) The User's Agreement, which was the subject of this action, permitted the ship repair companies to use the Graving Dock and imposed certain financial and experience requirements on prospective new users.

During negotiations with the Port and the participating companies and in discussions with the Navy prior to the simultaneous execution of the Navy's

lease and the User's Agreement, Arthur Engel was petitioner's only representative. (Tr. Vol. IX 1276 and 1309) As petitioner's agent he recommended restrictive terms for incorporation into the User's Agreement, for example, that it permit "the application of additional participants only on the anniversary date" of the User's Agreement, that is, at the end of its five year term. (Def.Ex.D, Tr. Vol. IX 1284-1286) He made that recommendation because he "wanted to to [sic] have some sort of a restriction as to when the companies, additional companies could become a member." (Tr. Vol. IX 1285-1286) The only information which petitioner ever received about the

proposed User's Agreement came from Arthur Engel. (Tr. Vol. IX 1276 and 1309)

Just two months before causing the incorporation of plaintiff, which the jury found to be his alter ego, Arthur Engel executed the Users Agreement on behalf of Triple A (Tr. Vol. IX 1312, Special Verdict, Issue 5, 260). The jury's finding was supported by substantial evidence of alter ego. (Tr. Vol. VIII 1157-1159, Vol. IX 1350-1351, Vol. IX 1312-1319 and 1321-1324)

Arthur Engle testified that he was the representative of Triple A who "combined, contracted, agreed, and conspired in violation of the Sherman Act to unreasonably restrain trade in

the ship construction, repair and renovation market...' (Tr. Vol. IX 1326-1327) and he also stated that he had "drafted and executed [an agreement] to Triple 'A' South's benefit, and in the event that he needed to do something else he knew how to break it..." (Tr. Vol. X 1422-1423)

Within two months of drafting the Users Agreement, Arthur Engel resigned from petitioner and formed respondent Southwest Marine as a competing ship repair company in the San Diego area. He thereafter requested, only as to his new company, respondent, a waiver of the terms concerning financial and experience requirements in the User's Agreement. When petitioner and the

other defendants below would not agree to a special waiver for Arthur Engel's new business alone, this antitrust suit was filed in the name of respondent Southwest Marine against the parties to that agreement. As alleged herein, respondent Southwest Marine was unlawfully excluded from the Graving Dock pursuant to the terms of the User's Agreement Arthur Engel negotiated and signed on petitioner's behalf.

These facts are undisputed.

## PROCEDURAL HISTORY OF THE ACTION

At the district court, respondent sought a preliminary injunction enjoining the enforcement of the User's Agreement against it, and that

injunction motion was denied. Sometime thereafter, defendant National Steel and Shipbuilding Co. ("NASSCO") voluntarily made the Graving Dock available to respondent through a series of partial assignments.

Respondent's damage claim was then tried to the jury. In special verdicts, the jury found certain terms of the User's Agreement unreasonable. (Tr. Vol. XIV 11) However, the jury also found that respondent was the "alter ego" of Arthur Engel and that Arthur Engel was therefore in pari delicto with petitioner and the other defendants below because he had negotiated and executed the User's Agreement upon which respondent's

antitrust action was based. (Tr. Vol. XIV 12) Thereafter, the district court denied respondent's post-trial motions for permanent injunctive relief, for attorneys' fees, and for judgment notwithstanding the verdict.

The Ninth Circuit reversed the jury's finding of respondent's truly complete involvement. (Appendix A) The Court below found that the "narrow reach" of it's prior decision in Javelin Corp. v. Uniroyal, Inc. 546 F.2d 276 (9th Cir. 1976), cert. denied, 431 U.S. 938 (1977), discussing a plaintiff's truly complete involvement and participation in an antitrust conspiracy, does not bar Arthur Engel's new company (respondent) from recovery based upon

the contract he originally negotiated and executed, notwithstanding the jury's findings on the alter ego issue.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Ninth Circuit has decided an important question of Federal law which has not been, but should be, settled by this Court.

In this action, the United States Court of Appeals for the Ninth Circuit has effectively emasculated both the truly complete involvement standard set out in Perma Life, supra, and the alter ego doctrine.

Even if this case involved only the rights of the litigants, it is substantial in its impact. The Ninth

Circuit now permits antitrust recovery by the alter ego of the instigator of an illegal conspiracy.

Such a result is contrary to the equities and federal law established by this Court.

But the effect of this litigation is far broader than the rights of the litigants. Even more significant is the long-range impact of this action on the enforcement of antitrust claims by any originator and participant in an antitrust conspiracy. Such plaintiff need only shift entities for purposes of litigation to escape the reach of the antitrust laws.

Additionally, the Circuits are divided in their interpretation and application of the "truly complete

involvement" standard enunciated in Perma Life Mufflers Inc. v. International Parts Corp. 392 U.S. 141 (1968).

The judgment of the United States Court of Appeals for the Ninth Circuit is erroneous and in conflict with its own decisions, with substantial rulings of this Court and with the other United States Courts of Appeals, as shown by the following sections. Such significant conflicts should be resolved.

## THE CIRCUITS ARE IN NEED OF CLARIFICATION OF THE TRULY COMPLETE INVOLVEMENT STANDARD

It has been sixteen years since the United States Supreme Court in Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S.

134, 140 (1968) stated:

> "We...hold that the doctrine of in pari delicto, with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action.
>
> Respondents, however, seek to support the judgment below on a considerably narrower ground. They picture petitioners as actively supporting the entire restrictive program as such, participating in its formulation and encouraging its continuation. We need not decide, however, whether such truly complete involvement and participation in a monopolistic scheme could ever be a basis, wholly apart from the idea of in pari delicto, for barring a plaintiffs' cause of action..."

It is time for that question to be decided.

The Ninth Circuit summarized the various circuits' interpretations of the truly complete involvement standard in Javelin Corp. v. Uniroyal Inc., 546 F.2d 276 (1976):

> The [Supreme] Court did not give any guidelines as to what degree of involvement might bar a

plaintiff other than to decide that the franchising scheme involved in Perma Life did not present such a case.

The courts have struggled with this imprecise standard ever since. In Premier Electrical Construction Co. v. Miller-Davis Co., 422 F.2d 1132 (7 Cir. 1970), The Seventh Circuit said:

> "[W]e believe that Perma Life holds only that plaintiffs who do not bear equal responsibility for creating and establishing an illegal scheme, or who are required by economic pressures to accept such an agreement, should not be barred from recovery simply because they are participants." 422 F.2d at 1138. (emphasis added).

Thus, only a co-equal in the conspiracy would be barred.

Such a situation faced this court in Dreibus v. Wilson, 529 F.2d 170 (9 Cir. 1975). The plaintiff was a co-founder and 50% shareholder of the allegedly wrongdoing corporation. The court adopted the reasoning of the district court's opinion,

which stated:

> "[E]ven if the establishment of this dealership could constitute monopolization, the plaintiffs cannot recover for it. By their own allegations, plaintiffs are the originating, active persons responsible for its establishment. Although the Supreme Court abolished in pari delicto as a defense in antitrust cases, the court [sic] indicated that a high degree of involvement in the illegal act could constitute a defense." 529 F.2d at 174 (citations omitted).

The Fifth Circuit in Greene v. General Foods, 517 F.2d 635 (5 Cir. 1975), broadly suggested that it would not maintain any in pari delicto type defense, but it expressly did not rule on this point. The court stated:

> "We have no occasion here to consider to what extent the 'in pari delicto' doctrine will continue to function in private antitrust litigation, if indeed the plaintiff is equally responsible, or a co-adventurer. * * * Even if

> we accept General Foods' argument that in pari delicto and closely related equitable defenses such as consent and unclean hands are still viable after Perma Life - an argument we seriously question - the record shows a great disparity between the plaintiff and the defendant..." 517 F.2d at 646-47.

Cf. Kestenbaum v. Falstaff Brewing Corp., 514 F.2d 690 (5 Cir. 1975) (while no bar, plaintiffs' participation may reduce damages).

Other circuits have emphasized that the plaintiff's participation must be in the formulation stage of a conspiracy to bar recovery. In South-East Coal Co. v. Consolidation Coal Co. 434 F.2d 767 (6 Cir. 1970), cert. denied, 402 U.S. 983, 91 S.Ct. 1682, 29 L.Ed.2d 149 (1971), the Sixth Circuit approved an instruction to the effect the plaintiff could not recover if "equally responsible with defendants in the formation of said conspiracy." 434 F.2d at 784. See also Columbia Nitrogen Corp. v. Royster Co., 451 F.2d 3

(4 Cir. 1971).

> Such decisions seem to temper Perma Life's apparent abolition of the in pari delicto defense. See ABA Antitrust Development 298 (2d ed. 1975). We agree that under certain circumstances a plaintiff may be barred from recovery, but believe that the mandate of Perma Life and the policy behind it demand that such circumstances be rare, and limited to where a plaintiff participated in the formation of the conspiracy.

## THE NINTH CIRCUIT IS IN CONFLICT WITH ITS OWN DECISIONS AND WITH SUBSTANTIAL RULINGS OF THIS COURT

In Javelin, supra, the Ninth Circuit interpreted the Supreme Court's truly complete involvement standard as follows:

> The in pari delicto defense, at the time of the Perma Life decision in 1968, already was not available as a defense in cases involving economic coercion where the plaintiff had no choice but to deal with the defendant and the restraints were largely for defendant's benefit. See Simpson v. Union Oil Co., 377 U.S. 13, 84 S.Ct. 1051,

12 L.Ed.2d 98 (1964). It seems clear, then, that the Court intended to go well beyond such a case of involuntary participation in Perma Life.

546 F.2d at 278, note 2

The Ninth Circuit then held:

A plaintiff is barred from recovery only when the illegal conspiracy would not have been formed but for the plaintiff's participation. To satisfy this test, the jury must necessarily find that the degree of participation of the plaintiff must be equal to that of any defendant and a substantial factor in the formation of the conspiracy. The instigator of an illegal scheme clearly is barred under this test.

546 F.2d at 280 (emphasis added).

In the opinion below, the Ninth Circuit acknowledged the jury's finding:

> "...that Southwest Marine was the alter ego of its president, Arthur Engel", stating that "[t]o find Southwest Marine barred from recovering...the jury must have found that Arthur Engel's personal participation in the conspiracy's formation operated to implicate Southwest Marine indirectly."

Southwest Marine v. Campbell Industries, 732 F.2d 744, 746 (9th Cir. 1984)

The court then reversed the jury's finding:

> Given the narrow reach of the Javelin defense, we refuse to attribute Engel's acts as a former agent of Triple A to the corporation of which he is now President. We therefore find that Javelin does not bar Southwest Marine from recovering against appellees.

732 F.2d at 746

The holding ignores the rule in Javelin and reduces the alter ego doctrine to an absurdity.

Without further discussion, the Ninth Circuit set aside that portion of the special verdict finding truly complete involvement; it refused to attribute Arthur Engel's acts to his alter ego.

Under this new Ninth Circuit rule one who originates, effectuates and encourages the continuation of an antitrust conspiracy may now evade the antitrust laws by simply creating an entity which is his alter ego through which to participate in the illegal scheme.

Such a rule ignores the letter and spirit of the Supreme Court's opinion in Perma Life.

By assuring Arthur Engel illegal profits if the agreement in restraint of trade succeeds, and treble damages if it fails, this holding encourages what the Sherman Act was designed to prevent.

See Perma Life, supra, 392 U.S. 134, 146.

Justice Marshall has stated:

> "...I cannot agree that the public interest requires that a plaintiff who has actively sought to bring about illegal restraints on competition for his own benefit be permitted to demand redress - in the form of treble damages - from a partner who is no more responsible for the existence of the illegality than the plaintiff.

392 U.S. at 151.

The hypothetical fact situation presented in the Perma Life decision is now squarely before the Court. The Court's supervision is needed to resolve the conflicts in the Ninth Circuit itself and between the circuit courts.

## CONCLUSION

For the reasons stated above, it is respectfully submitted that the question presented is worthy of consideration by the Court.

Respectfully submitted,

KHOURIE & CREW
Michael N. Khourie
101 California Street
Suite 1550
San Francisco, CA 94111

Counsel for Petitioner

**Appendix A**

United States Court of Appeals
For the Ninth Circuit

For Publication

NO. 81-5350
NO. 81-5477
USDC NO. CV-78-106-EBG

Southwest Marine, Inc., a California corporation,
Plaintiff/Appellant,

vs.

Campbell Industries, a California corporation; San Diego Marine Construction Corp., a California corporation; National Steel and Shipbuilding Co., a Nevada corporation; Triple A Machine Shop, Inc., a California corporation; and San Diego Unified Port District, a California corporation,
Defendants-Appellees.

Southwest Marine, Inc., a California corporation,
Plaintiff-Appellee,

vs.

Campbell Industries, a California corporation, et al.,
Defendants,
National Steel and Shipbuilding Co. and
Triple "A" Machine Shop, Inc.,
Defendants-Appellants.

OPINION

[Filed May 7, 1984]

Appeal from the United States District Court
for the Southern District of California
Hon. Earl Ben Gilliam, Judge Presiding
Argued and Submitted: November 1, 1982
Before: FLETCHER, NELSON, and REINHARDT,
Circuit Judges.

PER CURIAM:

A drydock facility in San Diego Bay was jointly operated by Campbell Industries, San Diego Marine Construction Corp., Atkinson Marine Corp., Triple A Machine Shop, Inc., and National Steel and Shipbuilding Co. Use of the dock was governed by a written agreement between these parties which restricted use to the signatories. Other companies were granted access to the dock only if they met certain requirements set forth in the User's Agreement.

Arthur Engel had been the general manager of Triple A at the time the User's Agreement was executed. He later left Triple A and became President and Chairman of the Board of Southwest Marine, a competing ship repair company. Southwest Marine was denied access to the dock pursuant to the User's Agreement.

Southwest Marine sued National Steel and Shipbuilding Co. and Triple A Machine Shop, Inc. for injunctive relief and damages, alleging a conspiracy in restraint of trade under section 1 of the Sherman Act, 15 U.S.C. § 1 (1976). After the district court denied the request for injunctive relief, National Steel and Shipbuilding Co. voluntarily made the dock available to Southwest Marine through a series of partial assignments. The damages claim proceeded to trial. The jury, in a special verdict, found for Southwest

Marine on the issue of liability, but also found that Southwest Marine was barred from recovering damages by its "truly complete involvement" in the formation of the illegal scheme. Southwest Marine moved for judgment notwithstanding the verdict. The district court denied the motion, entered judgment for the defendants, and denied Southwest Marine's motion for injunctive relief and related attorney's fees. Southwest Marine appeals from that denial. Appellees cross-appeal, claiming that because the jury was inadvertently exposed to inadmissible documents, they are entitled to a new trial if we hold for the appellants. Since there was insufficient evidence to support the jury's finding of truly complete involvement, we reverse and remand.

## TRULY COMPLETE INVOLVEMENT

To encourage private antitrust actions, the Supreme Court has refused to recognize the defense of *in pari delicto* in antitrust cases. *Perma-Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 140 (1968). The *Perma-Life* Court did not decide, however, whether "truly complete involvement and participation in a monopolistic scheme could ever be a basis, wholly apart from the idea of *in pari delicto*, for barring a plaintiff's cause for action." *Id.*

This court faced the unresolved issue of *Perma-Life* in *Javelin Corp. v. Uniroyal, Inc.*, 546 F.2d 276 (9th Cir. 1976), *cert. denied*, 431 U.S. 938 (1977), holding that a plaintiff is barred from recovery in antitrust only when the illegal conspiracy would not have been formed but for the plaintiff's participation. This test is satisfied when the jury has found that the plaintiff's degree of participation is "equal to that of any defendant and a substantial factor in the formation of the conspiracy." *Id.* at 279.

Plaintiff Southwest Marine, as a corporate entity, was not at all involved in the formation of the User's Agreement. The jury found, however, that Southwest Marine was the alter ego of its president, Arthur Engel. To find Southwest Marine barred from recovering, therefore, the jury must have found that Arthur Engel's personal participation in the conspiracy's formation operated to implicate Southwest Marine indirectly. Given the narrow reach of the *Javelin* defense, we refuse to attribute Engel's acts as a former agent of Triple A to the corporation of which he is now President. We therefore find that *Javelin* does not bar Southwest Marine from recovering against appellees.

ATTORNEY'S FEES

An antitrust plaintiff who "substantially prevails" in an action for injunctive relief is entitled to attorney's fees. 15 U.S.C. § 26 (1976) (as amended). The district court improperly rejected Southwest Marine's petition for attorney's fees for services rendered in attempting to obtain injunctive relief.

The legislative history of the 1976 amendment to section 26 suggests that awards of attorney's fees are essential if private attorneys-general are to enforce the antitrust laws. *See* 1976 U.S. Code Cong. & Admin. News 2572, 2588-90. To permit defendants to avoid the award of attorney's fees in suits for injunctive relief by ceasing their illegal conduct would reduce the incentive to bring suit, thereby frustrating Congress's intent. Thus, we choose to apply the standard developed under 42 U.S.C. § 1988 (1976) to awards under section 26.

Under 42 U.S.C. § 1988 a plaintiff may be awarded attorney's fees if he is a "prevailing party." In *American Constitutional Party v. Munro,* 650 F.2d 184 (9th Cir. 1981), we held that a plaintiff need not obtain formal relief to recover fees. Rather, for there to be a "prevailing party," there must simply be a causal relationship between the litigation brought and the practical outcome realized. *Id.* at 187; *Pomerantz v. County of Los Angeles,* 674 F.2d 1288, 1293 (9th Cir. 1983). As a result of the action filed by plaintiff, the defendants decided to permit Southwest Marine to use the dock under an assignment from National Steel and Shipbuilding Co. Thus, whether or not plaintiff ultimately prevails on damages on remand, it has "prevailed" within the meaning of 42 U.S.C. § 1988 (1976). *See Maher v. Gagne,* 448 U.S. 122 (1980); *Virginia Academy of Clinical Psychologists v. Blue Shield,* 543 F. Supp. 126, 130 (E.D. Va. 1982). The amount of fees ultimately awarded must await final disposition of the suit by the district court.

CONCLUSION

That portion of the special verdict finding truly complete involvement on the part of Southwest Marine is set aside due to insufficient evidence. We remand to the district court to determine whether National Steel and Shipbuilding Co. and Triple A are entitled to a new trial on the issue of liability because the jury was exposed to documents that were not admitted into evidence. If the district court decides that a new trial is not required, Southwest Marine is immediately entitled to a determination of damages, and an award of attorney's fees commensurate with this judgment.

REVERSED AND REMANDED.